***United States Court of Appeals***

***for the Second Circuit***


# APPELLANT'S REPLY BRIEF

B/S

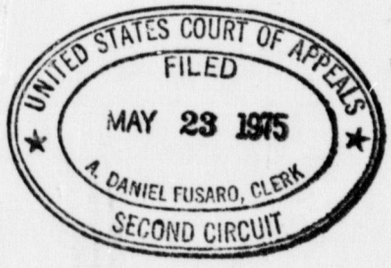
# 75-1065

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

| | |
|---|---|
| UNITED STATES OF AMERICA<br><br>-v.-<br><br>FRANK WINGATE and KENNETH LUKE SMITH,<br><br>Appellants. | 75-1065 |

REPLY BRIEF FOR
APPELLANT FRANK WINGATE

ON APPEAL FROM A JUDGMENT OF
THE UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF NEW YORK




WILLIAM J. GALLAGHER, ESQ.,
THE LEGAL AID SOCIETY,
Attorney for Appellant
FEDERAL DEFENDER SERVICES UNIT
509 United States Court House
Foley Square
New York, New York 10007
(212) 732-2971

SHEILA GINSBERG,
Of Counsel

4

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

| | |
|---|---|
| UNITED STATES OF AMERICA<br><br>-v.-<br><br>FRANK WINGATE and KENNETH LUKE SMITH,<br><br>Appellants. | 75-1065 |

# REPLY BRIEF FOR APPELLANT FRANK WINGATE

ON APPEAL FROM A JUDGMENT OF
THE UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF NEW YORK

## I

The Government by distorting the record and relying on inapposite authority seeks to mislead this Court into believing that Kenneth Smith's oral and written statements did not implicate appellant and did not contribute substantially to the prosecution against him. Quoting selectively from United States v. Trudo, 449 F.2d 649 (2d Cir.), cert.

denied, 405 U.S. 926 (1972) (Gov't. Br. at 20-21), the Government asserts that Trudo establishes the general principle that violations of Bruton v. United States, 391 U.S. 123 (1968) are avoided by the mere removal of the defendant's name from the co-defendant's confession. What is conveniently omitted from the Government's treatment of Trudo is the fact that the objected to confessions in that case had been redacted so as to remove all reference to the non-declarent. Specifically, the court in Trudo found no Bruton transgression because:

> [t]he excision here was complete . . .
>
> * * *
>
> In the instant case, no reference in the statement to any other person or persons was made.
>
> (United States v. Trudo, supra, 449 F.2d at 652.)*

Further ignored by the Government is the fact that if its analysis of Trudo were correct, Trudo would directly conflict with the logic of Bruton, supra, 392 U.S. at 143 as it has been applied by this Court and other Cir-

---

* Of the three persons who robbed the bank, two of them -- Trudo and Joshua Tatro -- confessed; George Tatro did not. The confessions did not even mention a third person.

> In essence, the jury heard only that Trudo planned to rob the bank and that Joshua Tatro later admitted that he robbed the bank.
>
> (Id. at 652).

cuit Court of Appeals, United States v. Glover, 506 F.2d 291, 298 (2d Cir. 1974); United States v. Serio, 401 F.2d 989 (D.C. Cir. 1968); United States v. Bozza, 365 F.2d 206, 214-18 (2d Cir. 1966); See App. Br. at 16-17.

In this case the substitution in the oral confession of the words "an individual" for appellant's name was ineffective to prevent the jury from concluding that the unnamed "individual" was appellant. Similarly, ineffective was the redaction of the written confession. The written confession was presented by the prosecutor as the "written memorandum of the oral statement." He asserted that there had been "certain deletions"*from the confession, but insisted that the jury could nonetheless find in the statement "the facts of this crime just as alleged in the indictment and just as [they] heard from Mr. Tyre."** In the face of these remarks, it was inevitable that the jury would con-

---

* Incredibly, the Government seeks to justify (Gov't. Br. at 24) this twice committed error by asserting, after the fact, that the prosecutor in referring to deletins was making oblique reference to Smith's prior record which, of course, was also inadmissible. Even assuming that the prosecutor's conduct was inspired by this improper motivation, that fact is irrelevant. The test here is how the remark was received by the jury. When viewed in conjunction with the assertion that the written statement commemorated the oral, the logical inference is that the "deletions" referred to contained evidence incriminating appellant.

** The Government's poignant attempt to explain the prosecutor's handling of Smith's statement as limited only to Smith is belied by the fact that Marrell Tyre's testimony was directed at inculpating appellant Wingate not Ken Smith.

clude that the appellant was the unidentified "he" with whom Smith had agreed to supply an "eighth" of heroin.

The Government disingenuously seeks support for its position in Judge Frankel's comment that Smith's statement was neither inculpatory of Wingate nor vital to the Government's case. (Gov't. Br. at 19). The real point here is that Judge Frankel's remark applies only to the written statement. This is clear because the remark was made during the suppression hearing* after defense counsel had indicated, without contradiction by the prosecution, his belief that the oral statement would not be used at trial.** Judge Frankel's

---

* Judge Frankel's comment appears at pages 121-122 of the minutes of the suppression hearing and not the trial as the Government's page reference mistakenly indicates. (Gov't. Br. footnote at 19).

** The Government's letter dated December 24, 1974, (Gov't. Appendix at 3a) informing Judge Frankel and trial counsel of the existence and possible use of Smith's oral statement was rendered inoperative by the prosecutor's subsequent change of mind. Trial counsel revealed, and the Assistant United States ATtorney concurred by his silence, that on the day before trial (December 26, 1974) the prosecutor informed counsel that the Government would use only the written statement.

> DEFENSE COUNSEL: . . . what the Government offers to remove from the statement to Mr. Murphy does not answer the problem, that they specifically questioned Mr. Smith in reference to specific dealings with Mr. Wingate in reference to events that evening and that by merely taking out those two questions and answers it would be clear to a jury that the Government is arguing that the other person involved is the defendant Wingate. And I think that any parts --
> [Continued on next page]

remark naturally did not take into account the prosecutor's subsequent use at trial not only of the written statement but also the oral statement against appellant.

Similarly misleading is the Government's contention (Br. at 21) that in light of appellant's testimony at trial, Smith's statements were not vitally important to the prosecu-

---

[Footnote ** continued from page 4]. . .

> THE COURT: Which questions and answers are you referring to specifically, Mr. Curley (Defense Counsel)? Are you talking about the written statement taken by assistant, Mr. Murphy?
>
> DEFENSE COUNSEL: Yes Your Honor. It is my understanding it's the only one to be offered, that was repeated yesterday by Mr. Fortuin, [the prosecutor.]
>
> (S.107) [emphasis added].

This record establishes unequivocally that sometime after the letter the Government's position, at least as expressed to trial counsel, was that the oral statement to Korniloff would not be introduced at trial. Even if trial counsel had misunderstood the prosecutor's intention, or, on the other hand, if the prosecutor had again changed his mind, his obligation was to so inform the Court and the parties. In derogation of that duty, his silence at that time and his subsequent arguments against severence, addressed only to the possible incrimination of the written statement (S. 107-112, S.119-126) were actively misleading. See United States v. Burke, Doc. No. 75-1021 (2d Cir., May 15, 1975) slip op. 3571, 3573. He is now estopped from asserting that (1) defense counsel failed to object to the admission of the oral statement, or (2) that Judge Frankel was adequately aware of the facts (S.121), or (3) that, as prosecutor, he fulfilled his obligations under the decisions of this Court. United States v. Glover, 506 F.2d 292 (2d Cir. 1974).

tion's case. However, the impact of Smith's statements* must be evaluated (as it would have been but for Government non-feasance at the close of the suppression hearing) by examining only the Government's case. What the defense presented is irrelevant to this issue, (See App. Br. at 21) for clearly appellant's decision to testify rested on the fact that the damaging evidence had already been admitted. In United States v. Lyon, 397 F.2d 505, 510 (7th Cir.); cert. denied, 393 U.S. 846 (1968), the Seventh Circuit reversed Lyon's conviction specifically rejecting the Government's contention that the defendant's testimony mitigated the Bruton violation. See also, Harrison v. United States, 392 U.S. 219 (1968); United States ex rel O'Connor v. New Jersey, 405 F.2d 632, 638 n. 20 (3d Cir.); cert. denied sub. nom. Yeager v. O'Connor, 395 U.S. 923 (1969); cf., United States v. Comporeale, Doc. No. 74-2603 (2d Cir. April 4, 1975).

Viewing the Government's case, it is critical that at the close of the case, Judge Frankel granted a judgment of acquittal on counts 2 and 3 of the indictment so that the only charge remaining was the conspiracy between Smith and appellant. Central to this charge and pivotal to the theory of the Govern-

---

* Again, the citation to Judge Frankel's evaluation (S. 122) (Gov't Br. footnote at 21) is deceiving in that the judge was referring to only the written statement (see infra at 4).

ment's case was whether there had been the essential agreement between Smith and appellant. The only direct evidence of this element is found in Smith's statements and the claim that they were nonetheless not vital to the Government's case is patently without merit.

II

Appellant's argument that he was entitled to introduce Smith's exculpatory suppression hearing testimony is misconstrued by the Government (Br. at 24). Appellant does not argue that he has a limited right to counter the Smith post arrest statements with Smith's testimony at the hearing. On the contrary, appellant contends that he had an absolute right to introduce this exculpatory material* regardless of the use of Smith's statements, and further that the devastating use by the prosecutor of these two confessions (See App. Br. at 15-22) only made Smith's testimony all the more critical.

A fair reading of Smith's testimony at the hearing establishes, beyond doubt, that it was exculpatory to appel-

---

* United States v. Gottlieb, 493 F.2d 987, 992 (2d Cir. 1974); and United States v. Roemer, Doc. No. 74-2677 (2d Cir., April 1975) slip. op. 2773, 2784-86, relied by the Government (Br. at 25) to establish that the district court has broad discretion to exclude evidence do not support the Government's contention here. In Gottlieb, this Court found that the error in refusing to admit the evidence was harmless, while in Roemer, the evidence sought to be introduced was inadmissible.

lant.* Smith's assertion that the reason he drove to the airport was as a favor to appellant conflicts with the Government's theory that he went because he had agreed with appellant to supply the heroin. In addition, Smith, when asked specifically about the truthfulness of his prior admissions of guilt, asserted that they were false. For example:

QUESTION: Mr. Smith, you were asked by the United States Attorney:

"Q You told the agent you were going to get the heroin from Bumpsie; is that right?

"A That's right."

THE COURT: Is that true or false?

THE WITNESS: That was false.

* * *

QUESTION: You were asked by the United States Attorney:

"Q What was Frank Wingate supposed to do?"
And the answer was:
"He might of" -- and then there was nothing after that. You were then asked by the U.S. Attorney:
"Q He set it up right. He set you up."
And you answered. "Right." Now, were the answers to those questions false?

ANSWER: Yes, I believe so. Would you ask that again so that I can get it clear in my mind?

QUESTION: Okay. Now, why did you give false answers --

THE COURT: No, he asked you to read it again.

---

* The entire testimony is "E" to appellant's separate appendix.

MISS BARLOW: Sorry.

QUESTION: The question was:

"Q What was Frank Wingate supposed to do?" And the answer was not complete. It was -- "A He might of --" The next question was: "Q He set it up; right? He set you up?" And the answer was "Right." Were the answers to those questions false?

ANSWER: Yes, those were false because they were leading questions. It wasn't the way it was put to me.

QUESTION: Why would you give the U.S. Attorney false answers?

ANSWER: I told you I definitely wanted to get to the street. In the street I could have gotten myself some heroin. I was getting sick and when you're sick you can play any part.

QUESTION: Were you in pain?

ANSWER: I was in pain.

QUESTION: What kind of pain?

ANSWER: I was in pain enough to sit there and sign for Mr. Murphy things.

(59-61).

Smith openly acknowledged the falsity of his prior assertion that appellant had set him up. This is not diminished, as the Government would have it, by his additional explanation that the reason he could give such false answers was because Murphy had asked him leading questions. Similarly, on cross-examination, Smith explained that other answers that he gave were made possible by Murphy's tactic of supply-

ing him with the information needed for his answers to the prosecutor's questions. (S. 75).

In addition, the entire thrust of Smith's testimony was that his prior statement were the involuntary product of the pain of drug withdrawal and were therefore untrue. Appellant was entitled to have this evidence before the jury.

The veracity of the assertions at the hearing was subjected to extensive cooss-examination by the prosecutor including, but not limited to, Smith's prior record, his assertions of heroin addiction, and his allegations that at the time of his arrest the authorities were forcing him to perjure himself in the statements in exchange for his release (S. 64-78). That the prosecutor failed to specifically ask Smith about Wingate's involvement is beside the point. See Mancusi v. Stubbs, 408 U.S. 204, 214-115 (1972). In light of Judge Frankel's expressed interest on direct examination about what Smith had to say concerning Wingate's involvement* (S. 59) the prosecutor undoubtedly had the opportunity to make inquiry on this issue if he had wanted

---

* "THE COURT: There are some [questions] in connection with Mr. Wingate, but I would like to hear what he said about him." (S. 59)

to do so. He can not now be heard to complain that he neglected to avail himself of that opportunity. Moreover, specific questions about Wingate are no different from the kind actually put to Smith; all of these questions are designed only to impeach Smith's credibility.

Ironic is the Government's argument that use of the suppression hearing testimony would be unfair to the Government! It was the Government's decision, over defense objection, to try Smith and appellant together, thereby preventing appellant from calling Smith as a witness for the defense. Had there been separate trials, Smith, if he had been tried first or had he been granted use immunity (18 U.S.C. §§6002, 6003), a procedure clearly envisioned by the Supreme Court in United States v. Wilson, 43 U.S.L.W. 4584, 4586 (decided May 19, 1975), could have testified for appellant.

Therefore, it was the appellant who was prejudiced by placing beyond his reach evidence useful to his defense. Due process requires reversal of his conviction to permit appellant the opportunity to present Smith's evidence to a jury.

For the foregoing reasons, and for the reasons set forth in appellant's main brief on appeal,* the conviction must be reversed and the case remanded for a new trial.

Respectfully submitted,

WILLIAM J. GALLAGHER, ESQ.,
THE LEGAL AID SOCIETY,
Attorney for Appellant
FEDERAL DEFENDER SERVICES UNIT
509 United States Court House
Foley Square
New York, New York 10007
(212) 732-2971

SHEILA GINSBERG,

Of Counsel

---

* The Government's answer (Gov't. Br at 27-31) to the charge of prosecutorial misconduct is unresponsive and without merit.

May 23, 1975